

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 202 OF 1996.

Rafiq Hussein Sheikh,
residing at 54/BP/70,
Lohianagar, Pune.

... Appellant.

V/s.

The State of Maharashtra.

... Respondent.

M.S.Mohite for the appellant.

B.H.Mehta for the respondent.

CORAM : V.G.PALSHIKAR AND V.C.DAGA, JJ.

DATED : 8th June 2005.

JUDGMENT : (Per V.C.Daga, J.)

. This appeal is directed against the conviction and sentence recorded by the Additional Sessions Judge, Pune dated 30th March, 1996 passed in Sessions Case No.382 of 1990. The appellant (accused No.1) came to be convicted under section 235(2) of the Code of Criminal Procedure, 1973 ("Cr.P.C." for short) for the offence punishable under section 302 of the Indian Penal Code ("I.P.C." for short) and sentenced to suffer life imprisonment and to pay fine of Rs.500/- and in default to suffer rigorous imprisonment ("R.I." for short) for nine

months. The accused No.2 Munna Yusuf Shaikh (brother-in-law of the appellant - accused No.1), charged for offence under section 302 read with section 34 of I.P.C., came to be acquitted for want of evidence.

Factual Matrix :

2. The prosecution case, in brief, is as follows:

. The complainant Mr.Audumbar Londhe, P.W.1 resides at 54/BP Lohiyanagar area, Pune along with his wife, sons and daughter. Deceased Raju was his youngest son. The accused also resides in the same area with his family. His house is near the house of Mr.Audumbar. Prior to the date of incident i.e. 14th May, 1990, there was a fight between accused No.1-Rafiq on one hand and deceased Raju and his friend Vijay Pote on the other. A complaint in this behalf was lodged with the police station.

3. On 14th May, 1990 at about 9 to 9.30 p.m., one Mr.Sukhadeo Yadav, known to Mr.Audumber Londhe, came to his house and told him that a day before i.e. on 13th night, his son Raju pulled the Chaddar (Bedsheet) from the face of one Mustak, who was sleeping in front portion of his house.

4. The complainant, in order to verify the correctness of the complaint made against his son by Sukhdeo called his son Raju. His son, deceased Raju denied to have done any such act. In order to seek confirmation of the information given by Mr.Sukhdeo, Mr.Audumbar went to the house of Mustak with along with his wife; deceased Raju, Anil, Balu; one Malanbai Khandare and Parubai Shinde. During the course of enquiry about the incident of pulling of bedsheet from the person of Mr.Mustak, which Mr.Audumbar was making, all of a sudden accused No.1-Rafiq appeared on the scene and assaulted Raju with knife and inflicted injuries on his chest. Accused No.2-Munna also came there and started beating Raju by his legs and feet. Mr.Audumbar raised hue and cry. Due to the stab injuries, Raju fell down on the ground.

5. On hearing hue and cry, lot many persons came to the spot of incident, thus, taking advantage of the mob both the accused ran away from the spot.

6. Complainant - Mr.Audumbar asked his another son to go to the police station and lodge complaint with the police. When accused-Rafiq was assaulting Raju, one Sonabai, mother-in-law of Audumbar

intervened and she also received injuries to her hands.

7. According to the prosecution, somebody informed the police on phone, consequently, police van came to the spot of incident. Police lifted Raju, put him in their van. They along with Mr.Audumbar reached Sasoon Hospital. Raju was admitted in the said hospital. The Medical Officer checked and declared him as dead.

8. The investigating officer Mr.Dhairyasheel Jadhav, (P.W.10) received message regarding stabbing as such he immediately rushed to Lohiyanagar at Timber Market. He learnt about the death of Raju. He, thus, recorded complaint of Mr.Audumbar (Exh.33). He sent the complaint to the police station along with report (Exh.50). The police registered offence under Crime No.107/90. Mr.Jadhav drew Panchanama of the scene of offence at Exh.29. He collected plain earth, earth mixed with blood, slipper and mat, cover of knife and attached the same under Panchanama. He sent two constables for taking search of the accused. He recorded statements of Anil; Audumbar and other 12 witnesses. When he returned to the police station, he found that constable had brought accused No.2.

Personal search of the said accused was taken. Blood stain clothes were seized. Accordingly, he was arrested under Panchanama at Exh.39.

9. After getting phone call from Swargate S.T.

Stand Mr.Jadhav went there and arrested accused No.1- Rafiq. He was personally searched in the presence of two Panchas. Knife, Lungi and shirt having blood stains were seized from his person and were attached under Panchanama (Exh.48).

10. After death of victim Raju, police went to the Sasoon Hospital and drew inquest panchanama (Exh.30). The dead body was then sent for post-mortem. The post-mortem report is at Exh.46.

11. Accused were sent to the hospital for collecting their blood samples. Complainant and his son were also sent to the hospital for the same purpose. On 18th May, 1990, entire Muddemal property was sent to the Chemical Analyser. The Chemical Analyser's certificates (8 in numbers) were proved and marked as Exh.57 to Exh.64. After completing investigation, Police Inspector Shri Jadhav prepared charge-sheet (Exh.66) which and submitted it to the Court of Judicial Magistrate, First Class (Court No.6), Pune.

12. The Judicial Magistrate (F.C.), Pune committed the case to the Sessions Court under section 209 of Cr.P.C. The charge was framed. It was read over and explained to him. He pleaded not guilty and claimed to be tried. Defence of the accused was of total denial. However, he has examined defence witness, whose evidence is at Exh.68.

13. After hearing the learned A.P.P. and the counsel appearing for the accused, learned Sessions Judge was pleased to acquit accused No.2 but convicted accused No.1 under section 235(2) of Cr.P.C. for the offence punishable under section 302 of I.P.C. and sentenced him to suffer life imprisonment and to pay fine of Rs.500/-, in default, to suffer further rigorous imprisonment for nine months.

14. Being aggrieved by the aforesaid judgment and order of conviction and sentence awarded; the appellant (original accused No.1) has preferred this appeal.

Submissions :

15. Heard learned counsel for the appellant-accused and learned A.P.P. for the State.

16. Learned counsel appearing for the appellant submits that the trial Court has relied upon the evidence of the father and brother of the deceased; which could not have been relied upon since they were the interested persons. He further submits that the prosecution did not examine any independent witness though the incident in question had taken place in a crowded area and lot many persons must have been present at the scene of the offence. It is thus submitted that possibility of stabbing by someone from the crowd itself cannot be ruled out. In his submission, at any rate no connecting link between the act constituting offence vis-a-vis present appellant - accused has been established. He further submits that no motive can be attributed against the appellant to commit murder of deceased Raju. There is no evidence to show previous enmity between accused and deceased Raju as such conviction, in the submission of the appellant, is unsustainable.

17. Per contra, learned A.P.P. appearing for the State relying on the evidence of the father and brother of the deceased Raju urged that their evidence fully corroborated the story put up by the prosecution as such no interference with the

impugned judgment and order is called for. In his submission, appeal deserves to be dismissed.

Consideration :

18. Having heard both sides, Mr.Audumbar Londhe (P.W.1) and Anil Londhe (P.W.5) are the only eye witnesses. Mr.Audumbar (P.W.1) is the father of the deceased-Raju. He has categorically stated that he has no knowledge about any previous quarrel between accused-Rafiq and deceased-Raju. Therefore, his evidence, so far as motive or previous enmity between the accused and the deceased is concerned, is of no use. Mr.Audumbar has further stated in his examination-in-chief that when he was making enquiry about the so called incident of removing the bed-sheet from the mouth of Mustak by deceased-Raju, all of a sudden the accused-Rafiq came to the spot of offence with a knife and caused stab injury by means of knife on the chest of his son Raju. He further stated that accused No.2-Munna also came on the spot and started beating Raju by his leg and fist. He also assaulted Raju by means of knife on hip. Mr.Audumbar further stated that again accused-Rafiq hit Raju by means of knife below the shoulder and then ran away. He further stated that he did see the scene by his own eyes. He then informed the incident to the Police on phone.

19. In the cross-examination, P.W.1- Mr.Audumbar has stated as under:

"It is incorrect that the accused Munna assaulted by means of knife on Raju."

20. Reading of the above examination-in-chief together with cross-examination with respect to alleged attack made on deceased-Raju, Mr.Audumbar has given contradictory version in his evidence. In the examination-in-chief he has stated Raju was assaulted by accused No.2-Munna by means of knife that too on hip, whereas in the cross-examination he has denied the very same version. This piece of evidence raises a reasonable doubt as to his presence on the spot of assault. Had he really been present there, he would have certainly tried to save his son deceased-Raju even after the alleged blows suffered by the deceased. But the entire evidence shows that he was silent spectator to the said incident.

21. Mr.Audumbar (P.W.1) attributes stab injuries by knife on the person of the deceased; out of which two by Rafiq and one by Munna. As against this, as per the medical evidence available on record, there were total six injuries found on the

person of the deceased. In this backdrop, if the evidence of Mr.Audumbar is examined, he has categorically denied that deceased-Raju was stabbed by accused No.2-Munna. If that be so, the stab injuries alleged to have been inflicted on deceased-Raju by accused No.2-Munna as stated in examination-in-chief will have to be excluded. In that light, if considered, Mr.Audumbar (P.W.1) has attributed only two stab injuries to accused No.1-Rafiq. No account was furnished so far as other four stab injuries are concerned. In the circumstances, his presence on the scene of the offence becomes little more doubtful.

22. The second eye-witness is Anil (P.W.5). He is younger brother of the deceased-Raju. He has stated in his examination-in-chief (para-2) that when he along with his father and Raju were trying to convince the family members of accused No.1-Rafiq, in the timber market, all of a sudden accused No.1-Rafiq came there and assaulted Raju by means of sharp edged weapon on his chest. Raju fell down. Accused No.2-Munna beat him by legs and fists. He stated that when Raju was lying on the ground, he with others raised hue and cry. Lot many people gathered on the spot. The Accused ran away taking advantage of the mob assembled on the spot.

Anil has not given any account so far as the injuries inflicted on the person of deceased-Raju by accused-Rafiq. He also does not give any account so far as previous enmity between accused-Rafiq and deceased Raju is concerned. He has denied knowledge with respect to any petty disputes between his family and that of accused No.1-Rafiq. Thus, so far as motive is concerned, Anil (P.W.5) does not throw any light. He has further stated in his examination-in-chief that after the stab injuries were inflicted on the person of Raju by accused No.1-Rafiq, Raju fell down and, thereafter, he personally went running to the Police and narrated true facts to the Police. Police immediately asked him to sit in the vehicle. He along with police came to the spot. When he reached the spot he observed that the dead body of Raju was already removed. He is the brother of deceased-Raju. His evidence needs appreciation with pinch of salt. There is no corroborative evidence corroborating the version of this witness Anil (P.W.5). The motive sought to be alleged is lifting of cloth (Chaddar) from the face of Mustak and not from the face of accused-Rafiq. There is no evidence to show any relationship between Mustak and Rafiq-accused No.1. The learned trial Judge has stated that accused-Rafiq was not liking the friendship of

deceased-Raju with Vijay Pote and Vijay Mohite and, thereby, he might have developed grudge in his mind. This finding recorded by the trial Court has no foundation at all. On the evidence of Audumbar and Anil both, accused No.2-Munna has been acquitted. In the circumstances, it becomes difficult to rely on the sole testimony of Anil (P.W.5).

23. In the above view of the matter, the prosecution story does not inspire judicial confidence. The judgment and order convicting the appellant-accused under section 302 of I.P.C. is liable to be quashed and set aside. The Appellant-accused is, thus, acquitted of the charges framed against him. Appeal is allowed. Bail bonds stand cancelled.

(V.C.DAGA, J.)

(V.G.PALSHIKAR, J.)